IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT BASELICE	:	CIVIL ACTION
v.	:	
PHILADELPHIA FEDERATION OF TEACHERS HEALTH & WELFARE FUND	:	NO. 01-477

MEMORANDUM

Dalzell, J. May 1, 2002

Robert Baselice brings this age discrimination case against the Philadelphia Federation of Teachers Health & Welfare Fund ("Fund"), his former employer, alleging that he was laid off as retirement coordinator, and given a newly created position of part-time retirement coordinator, because of his age. The alleged adverse job action occurred in the context of the reorganization of the Fund's staff.

Before the Court is defendant's motion for summary judgment.

Background[1]

The Fund is the employee benefits association which administers the employee health and welfare benefits guaranteed in the collective bargaining agreement between the Philadelphia Federation of Teachers ("Union") and the Philadelphia School District ("School District"). The Fund is a separate entity from the Union. Its employees are Union members, on leave from their positions in the School District, and who pursuant to the

[1] These facts are derived by construing the record in the light most favorable to the plaintiff.

collective bargaining agreement between the Union and the School District may return to their original positions in the District at any time. While at the Fund, however, they are not covered by any collective bargaining agreement. They are at-will employees.

Robert Baselice has a Bachelor of Arts Degree in history, a Masters Degree in education, and certifications in elementary school education and as a principal. He worked as an elementary school teacher in the School District for thirteen years and as a staff representative of the Union for two years. In 1983, the Fund hired Baselice as a retirement coordinator. As retirement coordinator, Baselice counseled employees who are planning their retirements; he also took phone calls from retirees who had questions about benefits or claims.[2] There is no reason to believe Baselice did not handle these responsibilities effectively.

In the spring of 1999, just prior to the events giving rise to this lawsuit, the Fund had on its staff two retirement coordinators, two benefits coordinators, and one Reading Recovery Specialist. Robert Baselice (age 53) and Dorothea Bell (age 54) were retirement coordinators. Ernest Merriweather (age 55) and Philip Petrone (age 55) were benefits coordinators. Rosalind Johnson (52) was Reading Recovery Specialist. The Fund was governed by the Board of Trustees, and its Chairman, Jack

[2] The in-person counseling is known as "retirement counseling." The counseling retirees by phone is known as "benefits counseling."

Steinberg. Arthur Steinberg, Jack Steinberg's son, was the Fund's lead coordinator.

In May of 1999, Jack Steinberg summoned Baselice into his office. Arthur Steinberg also was present. Jack Steinberg asked Baselice whether he would be interested in returning to school so that he could then take on additional responsibilities at the Fund. Steinberg said that he had in mind college courses at night in such areas as statistics and educational research. Baselice told Steinberg he was hesitant to return to school because of the impact the stress of school could have on his health.[3] Baselice nevertheless said, in effect, if that is what the Steinbergs wanted, he would send for course catalogs.[4] Steinberg asked Baselice how long he planned to work at the Fund and remain a School District employee, and Baselice replied, "I told him I would like to work, definitely, three more years, and,

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[3] I was a little bit tense because I had not been back to school for, approximately, seven years. And since that time I developed a medical condition, diabetes and high blood pressure, and I told Jack, with Art in attendance, that I was fearful of the stress of, you know, going back to class, taking exams, doing paperwork, how that might impact on my medical condition.

Baselice Dep. at 51.

[4] But if that's what they wanted me to do, I would call the local university and ask for catalogs to be sent to me and see what was being offered in those areas.

Id. at 51-52.

hopefully, if my medical condition allowed it, to work three more." Id. at 55.

On June 1, 1999, about ten days after the May meeting, Jack Steinberg again called Baselice into his office. Arthur Steinberg was again present. Jack Steinberg told Baselice he was to be laid off as retirement coordinator effective the end of the month. He offered Baselice interim work in a full-time capacity during the summer (July and August). He also offered Baselice a position as part-time retirement coordinator effective September. Baselice acquiesced to both positions. Steinberg explained the reason for the layoff was the economic distress of the Fund. Baselice Dep. at 56-59.

At this time, it is undisputed that the Fund was undergoing reorganization. That is, in June, the Fund eliminated two retirement coordinator positions - laying off Robert Baselice as retirement coordinator and Ernest Merriweather as benefits coordinator. The Fund established a new part-time retirement coordinator position, the one Baselice filled. In August, it hired two new employees, James Madgey (age 50) and Crystal Barnett (age 42), to fill a newly created position that consisted of part-time (50%) benefits counseling and part-time (50%) teacher training and development. Thus, the employee roster was: Dorothea Bell was full-time retirement coordinator and Robert Baselice was part-time coordinator; Philip Petrone was benefits coordinator; James Madgey and Crystal Barnett were benefits

coordinators/teacher training and development staff; and Rosalind Johnson was Reading Recovery Specialist.

Robert Baselice remained at the Fund until December 1999, when he left voluntarily. Baselice was replaced as part-time coordinator by Janice Bushman (age 65).

Baselice asserts claims of termination based on age in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, and in violation of the Pennsylvania Human Relations Act (PHRA), 43 Pa. C.S. § 955, as well as intentional infliction of emotional distress.

While the Complaint alleges age discrimination both with respect to Baselice's downgrade from full-time retirement coordinator to part-time coordinator and his eventual separation from the Fund, since the record discloses no evidence that Baselice's departure from the Fund was anything but voluntary, and Baselice has effectively waived any claim that he was constructively discharged[5] from the Fund because of his age by making no argument to that effect, we will analyze alleged age discrimination only with respect to Baselice's downgrade from full-time coordinator to part-time coordinator, not with respect to his departure from the Fund in December of 1999.

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[5] A resignation is not actionable under the ADEA unless it is a constructive discharge, which is measured by the high standard that "the conduct complained of would have the foreseeable result that working conditions would be so unpleasant or difficult that a reasonable person in the employee's shoes would resign." Gray v. York Newspapers, Inc., 957 F.2d 1070, 1079 (3d Cir. 1992).

Legal Standard

The Age Discrimination in Employment Act (ADEA) makes it "unlawful for an employer [] to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age." 29 U.S.C. § 623(a)(1). Our Court of Appeals has adapted the McDonnell Douglas burden-shifting framework to determine the sufficiency of evidence on summary judgment. Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108 (3d Cir. 1997); see also Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141-42 (2000).

The plaintiff must first produce enough evidence to convince a reasonable finder of fact of the prima facie case. The prima facie case of age discrimination consists of four elements: (1) the plaintiff was a member of the protected class of those forty or older, (2) the plaintiff suffered an adverse employment action, (3) the plaintiff was qualified for the position, and (4) the plaintiff was replaced by a sufficiently younger person, or there was other sufficient age disparity, to

create an inference of age discrimination.[6] Keller, 130 F.3d at 1108; Sempier v. Higgins, 45 F.3d 724, 728 (3d Cir. 1995).

Second, if the plaintiff can establish a prima facie case, the burden shifts to the defendant. The burden on the defendant is "relatively light." Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994). The defendant must "introduc[e] evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision." Id. While the burden of production shifts to the defendant, the burden of persuasion does not, for "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Reeves, 530 U.S. at 143. If the defendant cannot meet its burden of production, judgment should be entered for the plaintiff. Keller, 130 F.3d at 1108. If the defendant can articulate a legitimate

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[6] The customary formulation of this prong is that the plaintiff must be "replaced by a sufficiently younger person to create an inference of age discrimination." See, e.g., Keller, 130 F.3d at 1008; Sempier, 45 F.3d at 728. Several appellate decisions hold, however, that the plaintiff need not in all cases be replaced by a younger person. Rather, any age disparity between plaintiff and other employees which creates an inference of age discrimination will suffice. Especially in the reduction in force context, where the plaintiff is not replaced at all, and so cannot be replaced by a younger employee, our Court of Appeals urges a relaxed interpretation of the fourth prong. See Showalter v. Univ. of Pitt. Med. Ctr., 190 F.3d 231, 234-36 (3d Cir. 1999); Torre v. Cassio, Inc., 42 F.3d 825, 830-31 (3d Cir. 1994); Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, 353-354 (3d Cir. 1999); Martin v. Healthcare Bus. Res., No. 02-5117, 2002 U.S. Dist. LEXIS 5117, at *16 (E.D. Pa. March 26, 2002).

nondiscriminatory reason for the employment action, the burden returns to the plaintiff. Id.; Fuentes, 32 F.3d at 763.

Third, the plaintiff may overcome summary judgment in one of two ways. "[T]he plaintiff generally must submit evidence which: 1) casts sufficient doubt upon each of the legitimate reasons proffered by the defendant so that a factfinder could reasonably conclude that each reason was a fabrication; or 2) allows the factfinder to infer that discrimination was more likely than not a motivating or determinative cause of the adverse employment action." Fuentes, 32 F.3d at 762.

Under Fuentes, if the plaintiff attempts to use the first method and present evidence from which a reasonable jury could conclude the employer's proffered reason was a pretext or fabrication, the plaintiff generally must do more than show that the employer's purported reason for the employment decision is ill-advised. For "federal courts are not arbitral boards ruling on the strength of 'cause' for discharge. The question is not whether the employer made the best, or even a sound, business decision; it is whether the real reason is discrimination." Keller, 130 F.3d at 1109 (internal punctuation omitted) (quoting Carson v. Bethlehem Steel Corp., 82 F.3d 157, 159 (7th Cir. 1996)). Importantly, the Court in Fuentes stated:

> To discredit the employer's proffered reason, ... the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent.

> Rather, the non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence,' and hence infer 'that the employer did not act for the asserted non-discriminatory reasons.'"

Fuentes, 32 F.3d at 765 (internal citations and internal punctuation omitted).

If the plaintiff attempts to show that discrimination is more likely than not the motivating factor for the adverse job action, he may do so with direct or circumstantial evidence of discrimination. Id. at 764, 767; Keller, 130 F.3d at 1111-13.

Analysis[7]

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[7] Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In considering a motion for summary judgment we view the facts, and any inferences from them, in the light most favorable to the party opposing the motion. Groman v. Township of Manalapan, 47 F.3d 628, 633 (3d Cir. 1995).

The moving party bears the initial burden of proving that no genuine issue of material fact is in dispute. Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585 n.10 (1986). Once the moving party satisfies this initial burden, the nonmoving party "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Id. at 587. The nonmoving party must present "more than a mere scintilla of evidence." Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989). At bottom, he must come forward with sufficient evidence to enable a reasonable jury to find in his favor at trial. Id.; Groman, 47 F.3d at 633.

Baselice has not made out a prima facie case that he was laid off as retirement coordinator because of age discrimination. The Fund having decided to eliminate one retirement coordinator position, it had to lay off either Baselice or Bell. Baselice was the younger employee. Since there was no age disparity between Baselice and Bell (or any other employee for that matter) that is consistent with the inference of age discrimination, Baselice cannot make out element four of the prima facie case with respect to his layoff. See Showalter, 190 F.3d at 234-36; Torre, 42 F.3d at 830-31; Sempier, 957 F.2d at 1087.

Since there was, however, an age disparity between Baselice and Barnett and Madgey sufficient to support the inference that age discrimination accounts for the decision of the Fund not to offer Baselice the newly created position of benefits coordinator/teacher trainer and developer after it laid him off as retirement coordinator, we will proceed to examine the Fund's legitimate nondiscriminatory explanation for that decision.[8] [9] The Fund points to the need to expand its focus on

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[8] The difference in age between Baselice and Madgey is four years, and between Baselice and Barnett, twelve years. Construed liberally, this difference is sufficient to support an inference of age discrimination. See Sempier, 45 F.3d at 729-30 (holding that four years and eight years, respectively, was sufficient age difference between plaintiff and other relevant employees to sustain element four of plaintiff's prima facie case).

[9] The Fund makes a substantial argument that plaintiff does not meet prong three -- that the plaintiff was qualified for (continued...)

teacher training, and tight budget constraints, as the reasons for the elimination of Baselice's position as retirement coordinator and its hiring of Madgey and Barnett (who were already skilled in teacher training) to undertake teacher training and development. These reasons also account, in the Fund's view, for its elimination of Merriweather's position as benefits coordinator. The Fund thus meets its burden of production.

According to the affidavit of Jack Steinberg, beginning in 1997, the Fund revised its mission. "Due to the influx of new teachers into the School District, and the constant criticism that teachers were not being trained properly, the Fund decided to become more involved in the professional training and development of teachers." J. Steinberg Aff. at ¶ 4. Rosalind Johnson was hired as "Reading Recovery Specialist." Philip

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[9](...continued)
the position -- with respect to the benefits counselor and teacher trainer and developer position. While Baselice was qualified to perform benefits counseling, he did not have all of the requisite skills to perform teacher training and development programming. Ordinarily, this would disqualify plaintiff as it would preclude him from satisfying prong three of the prima facie case. However, here, the record unequivocally reflects that Jack and Arthur Steinberg considered Baselice for the new position, proposing to send him to school to make up for the shortcomings in his skills. Since the defendants, by their own admission, considered cultivating plaintiff for the newly established job despite the fact that he did not have all the qualifications, the inference remains possible that the real reason it did not give him the job was not because he was not qualified but because of age discrimination. See Torre, 42 F.2d at 830 ("'[T]he nature of the required showing' to establish a prima facie case of disparate treatment by indirect evidence 'depends on the circumstances of the case.'" (quoting Massarsky v. General Motors Corp., 706 F.2d 111, 118 n.13 (3d Cir. 1983)).

Petrone, benefits coordinator, was given an added responsibility of tracking the scores in the School District on statewide tests. Id. at ¶¶ 4, 19.

In the spring of 1999, the Fund decided to expand its teacher training program. Id. at ¶ 19. Specifically, the Fund set out to improve training of teachers in reading and math; expand teacher training to cover areas of classroom management and classroom support; and intensify tracking of test scores. Id. To implement and sustain these programs, the Fund needed to employ qualified professionals. Id. at ¶ 20. No current employee of the Fund had the necessary skills. Id. at ¶ 21; A. Steinberg at ¶ 9; see also Baselice Dep. at 52-53, 77-78. Furthermore, while teacher training was a new imperative, the Fund had to provide the desired programming within its limited budget, and without adversely impacting the provision of other health and welfare benefits to Union members. J. Steinberg Dep. at ¶ 20.

Although no Fund employee was qualified to perform training and development of teachers, the Fund initially considered sending a coordinator to school at night. Id. at ¶¶ 21-22. Indeed, Jack and Arthur Steinberg met with Baselice in May of 1999 and broached with him the possibility of returning to night school to acquire supplementary education. Based upon Baselice's unenthusiastic reception, see supra notes 1 and 2 and accompanying text, Jack Steinberg and Arthur Steinberg concluded

that Baselice was not interested. J. Steinberg Aff. at ¶ 23; A. Steinberg Aff. at ¶ 11.

The Fund thus in the end concluded that it would be best to hire an employee from outside the Fund. It decided not to groom a coordinator from within for several reasons. First, "the Fund did not want to put off instituting the training and development programs for two to three years while someone went to school." Second, "depending on the number of courses the coordinator needed to take to become proficient and the university s/he attended, the cost of sending someone to school could be expensive." Third, the existing collective bargaining agreement was slated to expire in August of 2001. Experience proved that contributions for health and welfare benefits were slack during the first year of any collective bargaining agreement; the Fund therefore thought it prudent to devote resources to teacher training and development before expiration of the contract. J. Steinberg Aff. at ¶ 24.

Accordingly, the Fund sought individuals skilled from outside the Fund, and reorganized its staff to absorb the new hires without unduly impacting its budget. Thus, the Fund eliminated two coordinator positions -- one retirement coordinator and one benefits coordinator -- and created a part-time retirement coordinator position. It hired two employees, Madgey and Barnett, to perform benefits counseling half the day and teacher training and development programming the other half.

As to the Fund's reason for eliminating Baselice, rather than Bell, as retirement coordinator, that decision was rooted in money. Baselice, who earned $88,510.14 per year, was much more highly paid than Bell, who earned $58,210.80. Id. at ¶ 37. The Fund laid off Merriweather, rather than Petrone, as benefits coordinator because Petrone had developed more versatile skills. Id. a ¶ 27.

Since the Fund has proffered a legitimate nondiscriminatory explanation for Baselice's change in status from full-time to part-time retirement coordinator, the burden returns to Baselice.

Of course, when there is reduction in force or other reorganization of the workplace, such a fact does not necessarily preclude employment discrimination. "If the reduction in force is a sham, or if the employer in a legitimate business cutback uses age to decide which employees to lay off, [the reduction in force] may be a pretext for discrimination." 8 Lex K. Larson, Employment Discrimination (MB) § 132.03 (Oct. 1999) (footnotes omitted); see Showalter v. Univ. of Pitt., 190 F.3d 231 (3d Cir. 1999) (finding pretext in the context of reorganization); Armbruster v. Unisys Corp., 32 F.3d 768 (3d Cir. 1994) (same).

Baselice argues that the Fund has not convincingly demonstrated the need to hire Barnett and Madgey rather than train him to perform the job of teacher trainer and developer/benefits counselor. The very implausibility of its position, he argues, reveals that it is a pretext.

The Fund maintains that neither Baselice nor any other coordinator at the Fund was qualified to do teacher training and development programming. Baselice's own deposition testimony supports the Fund's position. Baselice recalls that Jack Steinberg asked him in the May meeting to consider taking courses in educational research and statistics. Baselice admits that he has little or no education or background in both of those areas. Baselice Dep. at 51-53. Baselice also denies having training and experience in peer intervention, and concedes having no background in behavior modification, apart from using it in the classroom sixteen years ago when he was a teacher. Id. at 77. Baselice also acknowledges having no background in reading recovery and Web page fabrication. Id. at 78. Finally, Baselice's lack of qualifications to perform teacher training and development programming is confirmed by the undisputed fact that Steinberg proposed to send Baselice to school so that he could assume that responsibility.

Baselice reasons that the Fund could have inexpensively trained him to take on the responsibilities that Madgey and Barnett assumed. True, Baselice was qualified to perform benefits counseling, which Madgey and Barnett performed half of the time. However, the undisputed fact remains that Baselice would have had to have gone to school to undertake teacher training and development, and Madgey and Barnett did not. Baselice provides no suggestion of how much such additional school would have cost to support his conclusory assertion that

"Plaintiff would not have required a substantial time and monetary investment" in school. Pl.'s Mem. L. in Opp. to Summ. J. at 13. Nor does he venture what classes would have been necessary, and how long such school would have taken to complete.

Baselice also attempts to negate the asserted difference in qualifications between Barnett and Madgey and him. He maintains that there is no discernible difference, and that the proffered difference is merely a pretext for age discrimination. Barnett and Madgey are, as noted, younger than he.

Baselice points out that he has a Masters Degree in education, elementary-education and principal certifications, and taught elementary school for fourteen years. Baselice also was a Union staff representative, as was Barnett. These credentials, impressive as they are, absent other evidence are not weighty enough by themselves to permit a reasonable jury to conclude that Baselice had comparable credentials for teacher training and development to Barnett and Madgey. Barnett was experienced in behavior shaping modification and elementary reading research and analysis. J. Steinberg Dep. at ¶ 35. Madgey was a peer intervener. He also could help maintain the Fund's Web site. Id. at ¶ 36. Baselice has not presented any evidence that Madgey and Barnett did not have these qualifications, or that Baselice did.

Furthermore, Baselice has not produced evidence discrediting the Fund's assertion about the skills needed for the job -- such as statistics, peer intervention, and educational research. Baselice has not deposed Barnett or Madgey about what they do from day to day and what experiences they have, nor has he peeled away with any evidence of his own the Fund's representations about the qualifications necessary to perform teacher training and development. Consequently, Baselice has not demonstrated "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence.'" Fuentes, 32 F.3d at 765.

Baselice similarly asserts:

> Notably, Mr. Madgey and Ms. Barnett did not possess similar experience to each other, within a particular skill set from which Plaintiff was excluded. Their particular 'qualifications' for the training and development aspect of their positions were as disparate from each other as they were from Plaintiff's.

Pl.'s Mem. L. in Opp. Mot. Summ. J. at 13-14. This observation may be suggestive that the qualifications for the job of benefits coordinator/teacher training and development programmer were not as rigorous nor as specialized as the defendant has said. The fact alone that Barnett, Madgey and Baselice may, somehow, have different work histories does not convert the Fund's reasons for hiring Barnett and Madgey over Baselice into a pretext. The

plaintiff has demonstrated no "weaknesses, implausibilities . . . or contradictions", but merely proffers unsupported conclusions.

Baselice next attempts the alternate route of citing evidence from which a reasonable fact finder could conclude that discrimination based on age was more likely than not a motivating or determinative cause of the adverse job action. Fuentes, 32 F.3d at 764. Under this method, he "must point to evidence that proves age discrimination in the same way that critical facts are generally proved -- based solely on the natural probative force of the evidence." Keller, 130 F.3d at 1111. Here, he stresses that he was laid off as retirement coordinator and passed over for the new position of benefits counselor/teacher trainer and developer ten days after he told Jack Steinberg that he only planned to work three to six more years.

The time one will continue to occupy a job is not an automatic surrogate for age.[10] It is legitimate for an employer to consider how long an employee states he wishes to remain in a job before investing in supplementary education or other substantial outlays that only yield a marginal return later.[11] Of course, a manager's reference to an employee's eventual retirement can constitute evidence of age discrimination. Here, however, the surrounding facts make Baselice's and Steinberg's

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[10] Cf. Gray, 957 F.2d at 1087 (holding seniority -- or the length of time one has held a job -- as a distinct factor from age).

[11] In this case, Baselice's night school classes were expected to last two to three years. J. Steinberg Aff. at ¶ 23.

discussion of Baselice's retirement date insufficiently suggestive of age discrimination to present a genuine issue of fact of discrimination under Fuentes.

It will be recalled that Jack Steinberg's question to Baselice about how long Baselice intended to work was prompted by Steinberg's proposition to Baselice about returning to school and Baselice's response that he was concerned about the impact of his health problems. Jack Steinberg merely followed up on the natural consequences of what Baselice himself put in issue -- his health -- as it related to the position of benefit counselor/teacher trainer and developer. In that context, Steinberg's conversation with Baselice about his retirement date is insufficient evidence from which a jury could reasonably infer age discrimination. Indeed, it is worth noting that if Steinberg were motivated by age discrimination it is a wonder he would have offered to send Baselice to school to assume the additional responsibilities in the first place. Furthermore, recalling this workplace -- in which Baselice was by no means the oldest employee but in the middle, younger than the retirement coordinator retained, and ultimately replaced as part-time retirement coordinator by an older employee -- all the surrounding circumstances neutralize any reasonable inference of age discrimination that could be made from Jack Steinberg's single conversation with Baselice about Baselice's retirement. See Keller, 130 F.3d at 1111-12; Fuentes, 32 F.3d at 767.

Baselice also states that he was the most senior employee at the Fund, and one of the most highly compensated, factors which he posits are suggestive that he was laid off and given the replacement position of part-time retirement coordinator because of his age. It is clear, as noted above, that seniority is a distinct factor from age, and one which, when not used as a proxy for age, is permissible. Our Court of Appeals has stated:

> [Plaintiff] cites no support for his proposition that the ADEA protects an employee from an adverse employment decision based on seniority even if it cannot be demonstrated that chronological age was a factor. Indeed, it has been recognized that "seniority and age discrimination are unrelated. The ADEA targets discrimination against employees who fall within a protected age category, not employees who have attained a given seniority status."

Gray, 957 F.2d at 1087 (citation omitted). The ADEA proscribes employment decisions based on age, but not on seniority vel non.

The ADEA and PHRA impose identical standards of substantive liability for claims of discrimination based on age. See Martin, No. 00-3244, 2002 U.S. Dist. LEXIS, at *14; Harris v. Smithkline Beechem, 27 F. Supp. 2d 569, 576 (E.D. Pa. 1998), aff'd, 203 F.3d 816 (3d Cir. 1999). Since the Fund is entitled to summary judgment under the ADEA, it follows that it is also entitled to summary judgment under the PHRA. Baselice has waived

his claim of intentional infliction of emotional distress, as he has not addressed it in his responsive brief.[12]

We will grant summary judgment to defendant Fund. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT BASELICE	:	CIVIL ACTION
	:	
v.	:	
	:	
PHILADELPHIA FEDERATION OF TEACHERS HEALTH AND WELFARE FUND	:	NO. 01-477

ORDER

AND NOW, this 1st day of May, 2002, upon consideration of defendant's motion for summary judgment, plaintiff's response thereto, and defendant's reply thereto, and in accordance with the foregoing Memorandum, it is hereby ORDERED that:

1. Defendant's motion for summary judgment is GRANTED;

2. JUDGMENT IS ENTERED in favor of defendant Philadelphia Federation of Teachers Health and Welfare Fund and against plaintiff Robert Baselice; and

3. The Clerk shall CLOSE this case statistically.

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[12] Furthermore, the record does not disclose the existence of "extreme and outrageous conduct" "so extreme in degree[] as to go beyond all possible bounds of decency..." or medically determinable emotional injury necessary to make this legal theory tenable. Kazatsky v. King David Memorial Park, 527 A.2d 988, 991, 995 (Pa. 1987).

BY THE COURT:

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Stewart Dalzell, J.